79-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DIANE SALA,

Petitioner,

against

COUNTY OF SUFFOLK,

Respondent.

BRIEF IN OPPOSITION.

EDWARD J. HART
Attorney for Respondent
124 N. Merrick Avenue
Merrick, New York 11566

WADE T. DEMPSEY
Counsel for Respondent
219 Hempstead Avenue
Rockville Centre, New York 11570

TABLE OF CONTENTS

Cases Cited

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DIANE SALA,

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AFFIDAVIT IN OPPOSITION TO PETITIONER'S MOTION FOR EXPEDITED CONSIDERATION AND CONSOLIDATION

Respondent opposes petitioner's application for expedited consideration and consolidation so that the above entitled matter might be considered together with *Owen* v. *City of Independence, Missouri,* 589 F.2d 335 (8th Cir. 1978), *cert.* granted, No. 78-1779, 48 U.S.L.W. 3189 (October 1, 1979) because while both cases turned on the

court's finding that a good faith defense did exist so that a municipality had a qualified immunity the alleged constitutional violations are entirely different. Contrary to petitioner's assertion the important factual differences speak for the proposition that confusion rather than judicial efficiency would result.

While *Owen* involves an alleged due process violation and *Sala* involves an alleged violation of the Fourth Amendment the court could not avoid a thorough examination of the underlying policy considerations which are many.

The questions posed in petitioner's application for a writ can be answered without the court consolidating the cases. Since the court has agreed to review *Owen* presumably to further define the parameters of municipal liability no need exists for the court to grant the application for certiorari or the subject motion for consolidation and expedited consideration.

Respectfully submitted,

EDWARD J. HART
CURTIS, HART & ZAKLUKIEWICZ
124 N. Merrick Avenue
Merrick, New York 11566

November 9, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DIANE SALA,

Petitioner,

against

COUNTY OF SUFFOLK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent County of Suffolk opposes petitioner's application for a writ of certiorari seeking review of the judgment of the Court of Appeals for the Second Circuit entered in this case on August 17, 1979. Respondent also opposes any consolidation or expedition of this case for the purpose of considering *Owen* v. *City of Independence, Missouri,* No. 78-1779, cert. granted October 1, 1979 simultaneously.

Questions Presented

1. Whether a municipality may invoke a good faith defense in an action brought under 42 U.S.C. 1983.

2. Whether the public interest in careful, but forceful, governmental decision making requires that a municipality be afforded a qualified limited immunity from liability for damages under 42 U.S.C. 1983.

3. Whether the strip-search procedure for pre-trial detainees was constitutional when performed in that it was believed necessary and rationally related to the purpose for which it was conducted.

Statement of the Case

The statement in petitioner's application correctly recites the facts of the case, but certain opinions and inferences contained therein require comment.

The petitioner alleges that suit was brought after she was subjected to an "insensitive, demeaning and stupid" strip search. Although the plaintiff's subjective opinion is not disputed the respondent reiterates its contention that the search was performed in a manner best suited to minimize any degradation on the part of the petitioner. The petitioner also infers that the search was improper because the officer lacked probable cause or suspicion that the detainee possessed dangerous weapons or illegal contraband. Clearly the situation didn't permit the matron to form any conclusions as to who should and should not be searched. The procedure was administrative and applied with equality to any detainee.

The petitioner allegedly quoting the decision of the District Court asserts that numerous less offensive methods could have been exercised. The respondent disputes this contention; while other methods are possible and are now employed they are not as effective and will not detect various non-metalic items such as drugs and money.

The injunctive relief was not necessary in order to prevent further strip searches. The County voluntarily discontinued its policy before this matter ever came to trial.

The District Court ruled that a strip search as conducted on pre-arraignment detainees was unconstitutional, but afforded a good faith defense to the defendants because the alleged unconstitutionality was neither self-evident nor deemed discernable by able constitutional lawyers. Whether or not this search was in fact unconstitutional is still open to conjecture in light of the recently decided case, *Bell* v. *Wolfish,* 47 U.S.L.W. 4507. (May 14, 1979).

Reasons for Denying the Writ

Certiorari should not be granted in this instance because if the court wishes to make a pronouncement regarding the good faith defense as it is to be applied to municipalities it can do so in its decision in *Owen* v. *City of Independence, Missouri,* No. 78-1779, cert. granted. October 1, 1979. The facts in *Owen* are entirely different than the facts in *Sala,* however the good faith defense and the qualified immunity which is found to exist are nearly identical. *Owen* concerns the municipality's alleged wrongful termination of its police commissioner and the failure to afford the commissioner a hearing at which he

might clear his name. The 8th Circuit Court of Appeals recognized that no case law existed at the time the commissioner was terminated which entitled him to such a hearing. Since no cases existed to indicate the policy was unconstitutional the municipality should not have been aware they acted in an unconstitutional manner. Thus since the two circuits are not in conflict and the immunity is nearly identical there is no need to grant certiorari.

Further, there is no social course to be satisfied and no promise of deterence. The County had discontinued the procedure prior to the trial of the action. In regards to injuries, no measurable degree of harm is present in *Sala* which is not present in *Owen.*

The County is no longer following the procedures which required the strip search. Thus imposing liability would not in any way act as a deterent. The policy was not obviously unconstitutional and if examined prior to the *Sala* decision or even the arrest of the petitioner its alleged unconstitutionality would not have been evident. Thus it can't deter unconstitutional policies which are not reasonably predictable as to there unconstitutionality.

Petitioner suggests that *Sala,* being a long standing policy, offers itself to a more stringent review. On the contrary, *Sala* was adopted throughout the country and was presumed constitutional by a majority of the states. Since no case existed at the time of the search, the respondent couldn't conclude otherwise.

I.

Where there was no evidence of bad faith on the part of anyone charged with formulating or implementing the alleged unconstitutional policy and no case law suggesting the policy to be unconstitutional the municipality is entitled to a qualified immunity.

While a new avenue of liability may have been created by the decision in *Monell* v. *Department of Social Services,* 436 U.S. 412 (1978), with said liability must come the opportunity to assert the affirmative defense of good faith. Prior to the decision in *Monell,* a municipality was not considered a "person" within the meaning of 42 U.S.C. 1983 so that no liability could attach. *Monell,* was pending when the District Court rendered the decision so that the County was said to enjoy an absolute immunity. However, Hon. Justice George Pratt had the foresight to consider the liability of the County and recognized that some form of a good faith defense could be asserted.

After *Monell* was decided the Second Circuit Court of Appeals considered the within matter and declared that a limited good faith defense must exist. Since a municipality can only act through its elected officials and employees it is clear that officials of the County promulgated the questionable strip search procedures.

In reviewing the policies and the motivation behind each policy the reviewing body must be careful of hindsight. Certainly at the time the policy of performing a visual strip search was propounded by County officials the practice was believed to be constitutional. At the time the procedure was instituted the method was used in a large majority of all detention facilities throughout the nation. This fact was attested to by the petitioner's expert witness. It is clear that at the time the policy was

promulgated County officials rightfully believed the policy was constitutional.

The policy continued to exist because it was rationally suited to the protection of detainees and public officers. At the time the search was performed on the petitioner (October 1974) no case law existed which might have put the County on the notice that the procedure might be unconstitutional. Since no case law existed to suggest that the municipal policy was "constitutionally infirm", the municipality was not at fault (8a).

Although the District Court opinion declares the policy of strip searching pre-arraignment detainees to be unconstitutional, this decision is subject to reconsideration in light of *Bell* v. *Wolfish,* 47 U.S.L.W. 4507 (May 14, 1979). The County doesn't seek to review the decision of the District Court in so far as it declares the policy to be unconstitutional since it has and in fact had at the time of trial abandoned the practice. However, the *Bell* decision does stand as proof of the uncertain status of the law even at this date.

Since the policy was rationally related to the designed purpose the argument for constitutionality is not shallow. The fact that contraband was discovered only infrequently may be evidence of the effectiveness of the procedure. Although the County has abandoned the procedure the alternate methods suggested are not without their drawbacks. Devices such as metal detectors would not detect non-metalic contraband; and X-Ray may prove hazardous to the detainee's health.

The search should not have been declared to be unconstitutional, as it was reasonable and necessary and rationally suited to its purpose.

Since the County had already abandoned the policy of performing strip-searches on pre-arraignment detainees

prior to trial no injunction was required to eliminate the policy. The County's good faith is supported by the fact that they ceased upon the very questioning of the constitutionality of the matter. The court, however, rightfully concluded it was not reasonably predictable that said policies would infringe on the detainee's constitutional interests.

The petitioner implies that the search must be limited to situations where there might be probable cause to suggest that the detainee was concealing contraband. In fact the authority to search a person arrested springs from the arrest itself and has been said to extend to a full search of the individual. See *United States* v. *Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed. 2d 427 (1973).

The courts are not assigned the role of administering the nations prisons, but are to guard against violations of the Constitution.

> "Since problems that arise in the day to day operation of a corrections facility are not susceptible of easy solutions, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish,* 47 U.S.L.W. 4507

The *Bell* case involves pre-trial detainees so that considerations are not the exact same. However, *Bell* declared that body cavity searches on pre-trial detainees did not violate the Fourth Amendment.

What effect that might have on this litigation is not the issue which is to be resolved. The search now in

question was performed only once and there is no inference that the search had a purpose of punishing or embarrassing the detainee. Since the incarceration was lawful, and there is no doubt that the petitioner was lawfully incarcerated, there was a necessary withdrawal or limitation on many privileges or rights. Such a retraction was justified by the exigencies of our penal system.

Since the Fourth Amendment prohibits only unreasonable searches, the search was reasonable as it was pursuant to a lawful arrest. The court needs to consider all of the factors; the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted. In all aspects the search was performed with restraint and with a genuine effort to minimize embarrassment.

Finally, and most persuasive is the fact that neither the Suffolk County Sheriff's Office nor any other agency received a complaint regarding this policy prior to the *consideration of this* matter being reviewed together with the case of *Micaleff* v. *County of Suffolk,* which was consolidated and tried with this matter.

Agreeably, a detainee needn't be the sole guardian of his constitutional rights, but the situation is probative regarding the manner and attitude of the County. Clearly no impermissible motivation or disregard of the petitioner's rights can be shown.

II.

The public interest in careful, but forceful, governmental decision making requires that a municipality be afforded a qualified immunity.

A qualified immunity based on respondent's successful assertion of the good faith affirmative defense properly exists. The *Monell* decision changed the recognized principle of law that municipal bodies were not included within the class of "persons" subject to 42 USC 1983. However, it would be wrong to conclude that a previous absolute immunity had given way to a doctrine of liability without fault (8a). The *Monell* decision doesn't define or even declare a good faith immunity defense to exist.

> "Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties or addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under 1983 'be drained of meaning,' Scheur v. Rhodes, 416 U.S. 232, 248 (1974). Cf. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397-398 (1971)" *Monell* v. *Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018.

Monell does infer that some immunity defense may exist, leaving same to be outlined in later cases. The case at bar is a most limited immunity, because the Sheriff, Philip Corso, who had the power to change the policy on behalf of the County was shown to have acted in good faith and

was thereby immune. Extending said immunity to the municipality is entirely logical. If the procedure was obviously unconstitutional at the time it was initially promulgated the result would of course be different. However, the procedure was not then, nor at the time of the subject search, unconstitutional. No malice is suggested and no ignorance of case law is maintained.

In fact the Sheriff could not have been advised that policy was unconstitutional. The leading case in support of an officials duty to make himself aware is *Wood* v. *Strickland,* 420 U.S. 308 which declared:

> "The official himself must be acting sincerely and with a belief that he is doing right but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice." *Wood* v. *Strickland,* 420 US p 321.

Thus it is clear that no requirement is being made that officials become constitutional experts or clairvoyants able to anticipate evolving constitutional doctrine." See *Pierson* v. *Ray,* 386 U.S. 547. As no cases evidenced the alleged unconstitutionality at the time of the search and the policy was validly presumed constitutional the County of Suffolk may rightfully assert a good faith defense and enjoy a qualified immunity from damages under 42 U.S.C. 1983.

III.

Certiorari should be denied.

Petitioner's application for certiorari should be denied. The issues in *Owen,* supra and *Sala* are very different and a careful exercise of the courts discretion should result in a denial of the petition for certiorari.

In regards to the issue of a qualified immunity based on the affirmative defense of good faith the cases do not conflict. A frequently cited grounds for the granting of certiorari is a situation when two Circuit Courts of Appeal have rendered conflicting decisions on a constitutional issue. This is not the case and in fact *Owen* and *Sala* are compatible. Both cases granted a qualified immunity where the alleged unconstitutionality could not be gleaned from case law at the time of the alleged violation.

A further reason to deny certiorari is that while respondent doesn't intend to pursue affirmative steps to appeal the finding that the search was unconstitutional, the respondent will assert, in light of *Bell* v. *Wolfish,* supra that the strip search was constitutional and not a violation of the Fourth Amendment.

The respondent has abandoned the strip-search procedure and as the law now stands the strip-search is unconstitutional as to pre-arraignment detainees. Clearly nothing is to be gained by a grant of certiorari which would require the court to both consider the good faith defense in *Owen* and to reconsider the constitutionality of strip-search in *Sala.* The court can define the "good faith" defense by deciding *Owen* without considering *Sala* which contains issues which go beyond municipal immunity.

While *Owen* involves the alleged wrongful termination of the municipalities police commissioner and the failure to afford him a "name clearing hearing" the immunity

issue is nearly the same. In both cases the officials of the municipality would have had to have anticipated future decisions which declared there actions to be of questionable constitutionality.

Contrary to petitioner's assertion the action taken in *Owen* represents a better opportunity to begin to define a limited municipal immunity because the time and place of the promulgation of the alleged unconstitutional policy and exercise of such power are closer in time.

CONCLUSION

The petition for a writ of certiorari should be denied because the respondent enjoys a qualified immunity.

Respectfully submitted,

EDWARD J. HART
Attorney for Respondent
124 N. Merrick Avenue
Merrick, New York 11566

WADE T. DEMPSEY
Counsel for Respondent
219 Hempstead Avenue
Rockville Centre, New York 11570